

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Bay State Gas Company

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D.T.E. 06-07

HEARING OFFICER RULING ON MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

On January 27, 2006, Bay State Gas Company (“Bay State”) filed with the Department of Telecommunications and Energy (“Department”) a Motion for Protective Order (“Motion”) seeking protective treatment of the supply pricing provisions of a Long-Term Gas Supply and Capacity Agreement with Northeast Energy Associates, a Limited Partnership (“NEA Agreement”), the bid responses received by Bay State as a result of the competitive bid and RFP process, and SENDOUT® analysis which contains the negotiated prices for Bay State’s gas supply portfolio. No party filed an objection to the Motion. This Hearing Officer Ruling addresses that Motion and defines the protective treatment to be afforded.

II. MOTION FOR CONFIDENTIAL TREATMENT

A. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

[T]he [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”).

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. BAY STATE GAS COMPANY'S POSITION

_____ Bay State contends that certain supporting exhibits to its witness' prefiled testimony, "if unprotected, would disclose confidential information related to the transaction and which otherwise constitute material of a business confidential or trade secret nature." (Motion at 1). Bay State seeks to protect from public disclosure the contract terms providing supply pricing information; specifically, financial terms addressing capacity, capacity release, credit, mitigation, and guaranty (id. at 3). Bay State argues that confidential treatment would preserve Bay State's leverage in future negotiations with suppliers and other interstate pipeline carriers (id. at 3-4).

Bay State seeks a sunset of five years from the date the NEA Agreement expires and the right to seek perpetuation of such protection (id. at 4).

_____ Bay State further seeks protection of bid responses received by Bay State under mutual promises of propriety and confidentiality during its competitive bid and RFP process, and argues such standards and expectations of confidentiality should be maintained by the Department indefinitely (id.). Bay State argues that it uses pricing information and strategic pricing analyses contained in the SENDOUT® or other materials, which constitute confidential and competitively sensitive business information, and public disclosure could weaken Bay State's bargaining position and potentially increase the cost of procuring gas supplies (id. at 5). Bay State requests protection of proprietary analyses of price and non-price factors indefinitely on the basis the workproduct and rating information contained in Exh. FCD-6, FCD-7, and FCD-13 are confidential (id. at 5-6).

Bay State provides its SENDOUT® analysis to the Department, which contains the negotiated price for its gas supply portfolio, for the purposes of demonstrating the reasonableness of its capacity and supply decisions (id. at 6). Bay State argues this material includes confidential and competitively sensitive natural gas commodity pricing information and is a confidential business or trade secret, consequently, disclosure would jeopardize Bay State's current and future negotiations to obtain the lowest pricing for its gas supplies (id. at 6-7). Bay State argues indefinite protection is appropriate under G.L. c. 25, § 5D and requests such for FCD-9, FCD-10, and FCD-11 consistent with the protection commonly granted to semi-annual cost of gas adjustment filings (id. at 6).

_____ No party filed a response to the Motion.

IV. ANALYSIS AND FINDINGS

Based upon the Hearing Officer's review of the materials at issue, the Hearing Officer finds as follows.

First, the Hearing Officer finds the provisions of the NEA Agreement contain price and competitively sensitive terms which are confidential, proprietary information warranting confidential treatment. Moreover, the public dissemination of this material would place Bay State at a competitive disadvantage. Therefore, there appears to be a need for its nondisclosure.

Additionally, the Hearing Officer finds that specific pricing terms and analysis of competitive bids for gas supply contracts contained in FCD-9, FCD-10, and FCD-11 are competitively sensitive and could create a competitive disadvantage for Bay State. Therefore, there appears to be a need for its nondisclosure. Bay State, however, has requested protective treatment of information which does not warrant protective treatment, such as identification of the various bidders and assorted marketing materials of the bidders.

Finally, the Hearing Officer finds the SENDOUT® analysis contained in FDC-6, FDC-7, and FDC-13 is confidential and competitively sensitive natural gas commodity pricing information. Therefore, there appears to be a need for its nondisclosure.

Accordingly, the Hearing Officer has determined that Bay State has satisfied the three-part standard, outlined above, and hereby grants, in part, and denies, in part, Bay State's Motion for protective treatment. Accordingly, Bay State's Motion is granted with respect to information contained in its NEA Agreement and as to price information for which Bay State has requested protective treatment; specifically, FCD-9, FCD-10, and FDC-11, and FDC-6, FDC-7, and FDC-13, but is denied as to the identity of the bidders and other bidder information other than price contained in FCD-9, FCD-10, and FDC-11. Bay State is ordered to resubmit its materials indicating redaction of the materials for which it has been granted protective treatment. The protective status shall remain for three years from the date of this ruling on the basis the natural gas market is a constantly evolving market and the market and the market participants may have changed by the expiration of the NEA Agreement. At the close of the three years, Bay State may petition the Department to extend the protection.

V. RULING

Accordingly, after due consideration, the Hearing Officer finds as follows concerning the January 27, 2006 Motion for Protective Treatment of Bay State Gas Company with respect to information submitted in certain provisions of the Long-Term Gas Supply and Capacity Agreement with Northeast Energy Associates, a Limited Partnership, in bid responses received by Bay State Gas Company during its competitive bid and RFP process, and in SENDOUT® analysis.

(1) That the January 27, 2006, Motion for Protective Treatment is GRANTED, in part, and DENIED, in part as provided in Section IV; and

(2) That Bay State Gas Company is ordered to resubmit the materials for which it seeks protective treatment providing redaction of the materials for which it has been granted protective treatment.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. Responses to any appeal must be filed within two (2) days of the appeal.

Denise. L. Desautels
Hearing Officer

Date: March 3, 2006

